



November 14, 2001

Mr. Lou Bright  
General Counsel  
Texas Alcoholic Beverage Commission  
P.O. Box 13127  
Austin, Texas 78711-3127

OR2001-5277

Dear Mr. Bright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154797.

The Texas Alcoholic Beverage Commission (the "commission") received a request for several categories of information regarding Heineken USA, Inc. ("Heineken") and Miller of Dallas, Inc. ("Miller"). You state that you have released some of the requested information to the requestor. You claim, however, that some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.110 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

You claim that Exhibit D and some of the information in Exhibit C is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by statute. Section 5.48 of the Alcoholic Beverage Code provides as follows:

- (a) "Private records," as used in this section, means all records of a permittee, licensee, or other person other than the name, proposed location, and type of permit or license sought in an application for an original or renewal permit or license, or in a periodic report relating to the importation, distribution, or sale of alcoholic beverages required by the commission to be regularly filed by a permittee or licensee.

---

<sup>1</sup> We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(b) The private records of a permittee, licensee, or other person that are required or obtained by the commission or its agents, in connection with an investigation or otherwise, are privileged unless introduced in evidence in a hearing before the commission or before a court in this state or the United States.

The term "privileged" in this statute has been construed to mean "confidential" for purposes of the Public Information Act. Attorney General Opinion JM-1235 at 2 (1990); Open Records Decision Nos. 186 (1978), 62 (1974). Thus, section 5.48 makes confidential any records required or obtained by the commission, with the exception of "the name, proposed location, and type of permit or license sought in any application for a permit or license or any renewal thereof" and "any periodic report covering the importation, distribution, or sale of any alcoholic beverages required by the Board to be regularly filed by a permittee or licensee." You state that the documents in Exhibit D and some of the documents in Exhibit C are "private records" provided to the commission by Heineken and Miller, the concerned licensees/permittees, in connection with an investigation conducted under the authority of section 37.12 of the Alcoholic Beverage Code. You also state that these documents "have not been offered into evidence in any judicial or administrative proceeding or shared with any person or entity outside this agency." Consequently, we agree that Exhibit D and the documents in Exhibit C that were provided to the commission by Heineken and Miller are made confidential by section 5.48 of the Alcoholic Beverage Code. The commission must therefore withhold this information under section 552.101 of the Government Code.

You contend that Exhibit E and the remaining information in Exhibit C is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The commission has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the commission must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. Open Records Decision No. 588 at 7 (1991).

You indicate that the information in Exhibit E and the remaining information in Exhibit C was assembled by the commission "for the exclusive purpose of instituting a contested administrative proceeding under the Administrative Procedures Act." Based on your arguments and our review of the submitted information, we conclude that the commission has shown that litigation is reasonably anticipated under section 552.103 and that the information in Exhibit E and the remaining information in Exhibit C relates to the anticipated litigation. Therefore, the commission may withhold this information at this time under section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103(a) ends when the likelihood of litigation is concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To summarize, we conclude that: (1) the commission must withhold Exhibit D and the documents in Exhibit C that were provided to the commission by Heineken and Miller under section 552.101; and (2) the commission may withhold Exhibit E and the remaining information in Exhibit C under section 552.103.<sup>2</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

---

<sup>2</sup> As we are able to make this determination, we need not address the remaining claimed exceptions.

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/sdk

Ref: ID# 154797

Enc: Submitted documents

c: Mr. Allen Greenspan  
Jackson Walker, L.L.P.  
901 Main Street, Suite 6000  
Dallas, Texas 75202  
(w/o enclosures)